NO. 12558

In the United States Court of Appeals for the Ninth Circuit

EDDIE MATTOX AND BERTHA MATTOX, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF CROSS-APPELLANT

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STATEMENT OF JURISDICTION

Cross-Appellant, plaintiff below, cross-appeals from the final judgment which failed to award treble damages for rent overcharges in an action pursuant to Section 205 of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, *et seq.*) (R. 44). The Complaint was filed on May 19, 1949 (R. 2). The defendants answered on June 17, 1949. An amended Complaint was filed on September 8, 1949 (R. 20) and defendants filed an answer to the amended Complaint on September 30, 1949 (R. 31). The issues were tried

on the amended Complaint and Answer. Judgment was entered on March 7, 1950 (R. 44) based upon the Findings of Fact and Conclusions of Law (R. 38-44). Notice of Appeal was filed on April 25, 1950 (R. 47). Jurisdiction of the District Court was conferred by said Section 205 of the Act (R. 24). Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATEMENT OF THE CASE

The United States of America filed suit against the defendants for violations of the Housing and Rent Act of 1947 praying for an injunction restraining continued violations of the Act and regulations, for restitution and treble damages pursuant to Sections 205 and 206(b) of said Act.

The Complaint alleged that the defendants were landlords of a housing accommodation located at 1803-23 Ellis Street in the City of San Francisco (R. 2).[1] The Complaint further alleged that the defendants were collecting rents in excess of the legal established maximum (Par. 5, R. 3). These overcharges were set out specifically in Exhibit A which was made a part of the Complaint (R. 7-8).[2] The defendants filed an answer to this Complaint which consisted of a general denial (R. 9).

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[1] The address of these premises run from 1803 to 1823 Ellis St., but they are in reality one apartment building with separate entrances (R. 54).

[2] The schedule referred to contained the name of the tenant, the address of the premises, the period of occupancy, rent collected, the legal maximum rent, the number of overcharges, the amount of each overcharge and the total prayed.

While this action was pending, the United States moved for a temporary restraining order and a preliminary injunction preventing the defendants from pursuing two Unlawful Detainer actions in the Municipal Court for the City of San Francisco (R. 11-12). On July 12, 1949, the temporary restraining order was signed and an Order to Show Cause issued returnable on July 18, 1949. On July 19, 1949, an injunction was issued restraining defendants from unlawfully evicting certain tenants (R. 17).

Upon the basis of an investigation conducted during the pendency of the original Complaint (R. 51), the Government moved to file an amended complaint alleging more widespread violation than previously and overcharges of approximately $8,000 (R. 20). The motion was evidently granted.

In Exhibits A and B of that Complaint, the overcharges are again specifically set forth (See footnote 2, *supra*) and each Exhibit is divided into two parts. The first part of Exhibit A covered by Count I prays for restitution to the tenants of all overcharges not barred by the statute of limitations (Par. 5, R. 21). Count II is based upon an action for treble damages involving the same tenants and the same premises as specifically set forth (Par. 3, R. 22). Counts III and IV cover Exhibit B and pray for damages and restitution respectively for the entire period of the overcharge (R. 28). These overcharges are based upon retroactive rent reduction orders issued on or about June 2, 1949 (Par. 3, R. 23).

The defendants filed an answer to this Complaint (R. 31-38) in which they set up various defenses. The de-

fenses to Count I are (1) that no maximum rent may be established because such action is forbidden by Section 203(a) of the Act[3] (Par. 1, R. 31); (2) that the Court is without jurisdiction of the action (a) because the 1949 amendment to the Act repealed the Act itself (Par. 2(a), R. 32) and (b) the Act is unconstitutional because it is not uniform and not national in scope (Par. 2(b), R. 32); (3) that the accommodations in question are not controlled housing accommodations; and (4) a general denial (Pars. 3, 4 (R. 33)). The answer to Count II is a general denial (Par. 2, R. 35), and that the Complaint fails to state a claim (Par. 4, R. 35). The defense to Count III is that the defendants were never served with the order (Par. 3, R. 36) and as to Count IV, there is again a general denial (Par. 2, R. 37), and the charge that the Complaint fails to state a claim (Par. 3, R. 37). Nowhere do appellants plead the lack of wilfulness or the failure to take practicable precautions.

The case went to trial before the Honorable Herbert W. Erskine (D. J.) on December 9, 1949 (R. 48). There were 12 witnesses for the plaintiff, eleven of whom testified that they paid more than the legal maximum rent (R. 72, 75, 78, 81, 86, 92, 95, 97, 107-108, 115, 116, 120, 122, 124, 128, 129, 136, 138). The defendants' witnesses (eight in number) all testified that they were or had been tenants of the defendants and

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[3] Section 203(a) provides as follows:

"Sec. 203. (a) After the effective date of this title, no maximum rents shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations."

they were never overcharged during their tenancy (R. 101, 103, 153). The plaintiff's witnesses were in a measure corroborated by a neutral third party who testified that as chairman of a Union Welfare Committee who paid the rent of members who were on strike, that the defendants demanded rent in excess of the legal maximum from the Union in the amount testified above (R. 143-144).[4]

The defendants testified in their own behalf (R. 174, 196) in which they said that they kept no books; that they issued no receipts and that they had never checked with the Area Rent Office after purchasing this property to determine the legal maximum rents. The defendant, Eddie Mattox, testified that even when called to the Area Rent Office on another matter, he did not check with the Area Rent Office to determine the legal maximum rents (R. 217). Furthermore, the overcharges on eight of these apartments are based upon retroactive orders which were issued in face of the defendants' failure to appear and testify concerning them prior to issuance, although they stipulated at trial that they were notified (R. 69). So too, defendants failed to protest or appeal from the orders after their issuance.

At the conclusion of the trial, the Court below entered a judgment of restitution to the tenants in a total amount of $6,761.80 (R. 44). The Court enjoined the defendants from charging more than the legal maxi-

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[4] Plaintiff's Exhibit 16 is particularly significant in this connection since it is the return of a check made out to the tenants for the rent but not in an amount demanded by the defendants and returned to the Union as insufficient (R. 144).

mum rents and further enjoined them from evicting any of the tenants unlawfully (R. 45). The Court, however, notwithstanding the prayer of plaintiff's Complaint for relief under Section 205 of the Act, failed to enter a judgment for any statutory damages in favor of the Government.

From that judgment, the plaintiff has taken a cross-appeal on the ground that the Court below erred in failing to enter a judgment for any statutory damages, and, likewise in failing to enter a judgment for three times the amount of the overcharges (R. 255).

ARGUMENT

I.

(A) The Court Below Erred in Denying Any Statutory Damages Pursuant to Section 205 of the Act.

(B) The Court Below Also Erred in Failing to Enter a Judgment for Three Times the Amount of the Overcharge, Because the Defendants Neither Pleaded Nor Proved the Lack of Wilfulness and the Taking of Practicable Precautions as Provided in Section 205 of the Act.

The Court below at the conclusion of the trial entered a judgment for restitution of the overcharges (R. 44), but failed to enter a judgment for statutory damages pursuant to Section 205[5] of the Act as alleged

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[5] Section 205 of the Act provides in part, as follows:

"Sec. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or

and as prayed in plaintiff's complaint (Par. 3, R. 25). The Court below, therefore, erred in denying any statutory damages whatever and again erred in failing to enter a judgment for three times the amount of the overcharge because of the defendants' failure to plead either the lack of wilfulness or the taking of practicable precautions.

These contentions will be discussed in order.

(A) The Court below erred in denying any statutory damages pursuant to Section 205 of the Act.

This Court from the earliest days of rent control has held that when overcharges have been established, the trial court must grant a judgment in damages in an amount at least equal to the amount of the overcharges. *Fontes* v. *Porter,* 156 F. 2d 956 (C. A. 9th). This Court there said, at p. 958: "Lack of wilfullness, coupled with the taking of practicable precautions against the occurrence of a violation, operates only to reduce damages to the amount of the overcharge." Accord: *Bowles* v. *Hasting,* 146 F. 2d 94 (C. A. 5); *East* v. *Bowles,* 158 F. 2d 227, cert. denied, sub. nom. *East* v. *Porter,* 321 U. S. 827; *Woods* v. *Olinger,* 170 F. 2d 895 (C. A. 5); *Woods* v. *Haydell,* 178 F. 2d 914 (C. A. 5). As that Court said in the *Haydell* case in determining that a court must enter judgment for at least the

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received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * * "

amount of the overcharges when the overcharges have been found to be made:

> "Whenever it is determined that there has been an overcharge, damages for the full amount of such overcharges should be awarded. *Bowles* v. *Hasting,* 5 Cir., 146 F. 2d 94; *Creedon, Expediter* v. *Olinger,* 5 Cir., 170 F. 2d 895. In this case the judgment should have been for all overcharges found to have occurred after the reduction order of May 18, 1945, even though the overcharges were nonwillful and not caused by the failure on the part of the landlord to exercise due care". (p. 915)

The above principle of law is not affected in any way by the grant of restitution of the amount of the overcharges to the tenant since restitution was awarded pursuant to Section 206(b) of the Housing and Rent Act. The Supreme Court and this Court have held that an action of restitution is different from and independent of an action for damages. *Porter* v. *Warner Holding Co.,* 328 U. S. 395; *Woods* v. *Richman,* 174 F. 2d 614, 616 (C. A. 9th); *Smith* v. *Woods,* 178 F. 2d 468 (C. A. 5). And it has been held that restitution may be granted in conjunction with a judgment of damages in the sum of three times the amount of the overcharges. *Woods* v. *Witzke,* 174 F. 2d 855 (C. A. 6).

It thus clearly appears that the Court below erred in denying all statutory damages whatever.

(B) The Court below erred in failing to enter a judgment for three times the amount of the overcharge because of defendants' failure to prove that they were not wilful or that they took practicable precautions.

The judgment aforesaid was based upon findings of fact, among which was No. IX (R. 41):

> "That violations of the Housing and Rent Act of 1947, as amended, and the Regulations issued pursuant thereto, and committed by the Defendants Eddie Mattox and Bertha Mattox, were neither willful nor did they result from the failure of the said Defendants to take practicable precautions."

The plaintiff appeals from that finding on the ground that it has no support whatever in record and is "clearly erroneous".

In asking this Court to reverse that finding, the Government is aware of the provisions of Rule 52(a) of the Federal Rules of Civil Procedure[6] (28 U. S. C. A. foll. 723(c)). However, as is demonstrated hereinafter the record not only does not contain "substantial" evidence to support the above finding but is so lacking in evidence of any kind to support it, it is "clearly erroneous". *Lerner Stores Corp.* v. *Lerner,* 162 F. 2d 160, 162 (C. A. 9th).

In addition, this Court has held that where the defendant attempts to reduce the damages to the amount of the overcharges, it is incumbent upon him to establish that the overcharges were neither wilful nor the result of failure to take practicable precautions. *Bowles* v. *Glick Bros. Lumber Co.,* 146 F. 2d 566, speaking of the twofold defense set out in Section 205(e), this Court said:

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[6] Rule 52(a) provides in part as follows:

" * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

> "Such partial defenses as are afforded by the amendments must be pleaded and proved by the defendants * * *." (at pp. 571-72) See, *McCoy* v. *Fleming,* 160 F. 2d 4 (C. A. 5).

In holding that both elements of mitigation must be pleaded and proved, the Court of Appeals for the Fifth Circuit stated in the *McCoy* case, *supra,* holding that where the defendant "did not even attempt" to prove that he took practicable precautions the trial court did not abuse its discretion in granting treble damages. In that connection, the Court said (160 F. 2d, at p. 5):

> "Whatever may be said upon the question of willfulness, it is perfectly clear that the court did not find, it could not have found, that the violations were not the result of failure to take practicable precautions. Here the defendant did not even attempt to prove that he took practicable precautions against the occurrence of the violations. Indeed, the record showing that he took no precautions, establishes the exact contrary. The record standing thus, the judgment awarded was entirely within the discretion of the district judge, * * *."

An examination of the record on file herein discloses that defendants not only failed to plead the defenses provided in Section 205 of the Act, *supra,* p. 6, but the record disclosed a course of conduct deliberately intended to violate the Act. The defendants filed two answers. One, an abbreviated answer to the original complaint (R. 9), and the other, a voluminous, verbose answer to the amended complaint (R. 31-38). In nei-

ther answer do the defendants plead the lack of wilfulness and the failure to take practicable precautions. In any event, in the present state of the record such pleas would be unavailing.

Wilfulness has been defined as wrongful conduct which was "knowingly" or "deliberately", but not necessarily "malevolently" committed:

> "In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in United States v. Murdock, 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' United States v. Illinois Cent. R. Co., 303 U. S. 239, 242, 58 S. Ct. 533, 535, 82 L. Ed. 773. In view of this statement there can be no doubt that the court below gave the jury a correct definition of the word 'wilfully' as used in the statute under consideration." (*Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. A. 1))

And more recently a defendant was assessed treble damages where he "moved with his eyes open." In affirming the judgment, the Court of Appeals held that the district court was justified in imposing treble damages "for intentional violation" (*Woods* v. *Polis,* 180 F. 2d 4, 7 (C. A. 3rd)).

The defendants here admitted that although they were responsible by express direction of the Regulation to notify the Area Office of the change of landlords,[7] they failed to do so (R. 216). They admittedly failed to do so even though they had occasion to visit the Area Rent Office in connection with a violation of other property rented by them (R. 217). Furthermore, two-thirds of the violations here were based upon orders decreasing rent (Pl's Exhs. 5 to 12, R. 62), and which defendants stipulated were properly certified as mailed (R. 68). In addition, they stipulated that the accompanying letter, and the notice of proceedings were properly certified as mailed (R. 68). The record is silent that the defendants answered the notice, and appeared prior to the issuance of the orders, or that they protested and appealed the orders after issuance as they had a right to do.[8]

These orders were all effective on dates prior to issuance, and therefore required a refund (R. 60, 62, 64,

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[7] Section 7(a) of the Regulation provides in part:

"* * * Where, since the filing of the registration statement for any controlled housing accommodations, there has been a change in the identity of the landlord, by transfer of title or otherwise, the new landlord shall file a notice of such change on a form provided for that purpose, to be known as a notice of change in identity within 15 days after the change or July 1, 1947, whichever is later. If the new landlord indicates on the notice of change in identity that he has not obtained the landlord's copy of the original registration statement, the Expediter shall cause to be prepared and delivered to him a true copy of said original, which may be used to satisfy all requirements of this paragraph (a). * * * "

Compare, *Woods* v. *Tate,* 171 F. 2d 511, 512 (C. A. 5th)

[8] Section 840.14 of Rent Procedural Regulation No. 1 (13 F. R. 2369) provides for appeal to the Expediter. (See, text in Appendix, *infra,* p. 20).

65, 66). The orders were based upon an investigation which showed that although the defendants registered the premises as furnished apartments, they had not been rented as furnished for some time (R. 51). The retroactive refund of these premises was demanded from the date they were no longer rented furnished (R. 51). Since the defendants failed to oppose the issuance of the order, or to appeal after its issuance, their failure to comply with its terms to refund is necessarily a knowing, deliberate overcharge.

In addition to the foregoing, the defendants were under a preliminary injunction restraining them from wrongfully evicting tenants in possession (R. 49). Thus, the record shows that they were previous violators (R. 217), that they deceived the Area Rent Office in failing to report a reduction in services as provided in the regulation[9] (R. 51), that they attempted to evict tenants wrongfully and were restrained (R. 49), and finally, that they refused to refund as ordered, although they neither appeared to contest the order, nor protested and appealed its issuance.

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[9] Section 5(b) of the Regulation provides:

"(b) *Decreases in minimum services, furniture, furnishings, equipment and space.* (1) The landlord shall, until the accommodations become vacant, maintain the minimum services, furniture, furnishings, equipment and living space as required under Section 3, unless and until he has filed a petition to decrease the services, furniture, furnishings, equipment or living space and an order permitting a decrease has been entered thereon. When the accommodations become vacant, the landlord may on renting to a new tenant decrease the services, furniture, furnishings, equipment or living space below the minimum; within 10 days after so renting the landlord shall file a written report with the area rent director showing such decrease."

On the basis of the foregoing, defendants cannot contend that they did not knowingly violate the Act or that they took practicable precautions, as provided in said Act. *Bowles* v. *Glick Bros. Lumber Co.,* 146 F. 2d 566 (C. A. 9th).

Long prior to the enactment of the Housing and Rent Act of 1947, the Court in the Fifth Circuit has recognized the importance to effective rent and price control of granting treble damages where wilful overcharges had been established. In *Bowles* v. *Hasting, supra,* that Court held that treble damages had a deterrent effect upon the violation of the maximum rents:

> "When an excess in price is charged the damage is done, and the excess must be repaid, tripled in order to prevent recurrence. * * *" (146 F. 2d at p. 95)

That principle has now been embodied in the Act as it now reads, and this Court should reaffirm it.

The cases above cited were construing Section 205(e) of the Emergency Price Control Act of 1942, as amended, set forth below. That Section and its successor are verbatim in requiring the two-fold defense; they provide in part as follows:

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925(e)):	The Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1895):
"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a	SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maxi-

maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the mum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: "*Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the

amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * *"

United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. * * *"

By a comparison of the plain language of section 205(e) of the Act of 1942 with Section 205 of the Act of 1947, this Court may readily see that there is no discretion left to the trial court to determine damages between the amount of overcharges and treble damages, where the defendant fails to establish the two-fold defense. The Emergency Price Control Act provided for the exercise of the District Court's discretion to determine whether it wished to increase the amount of the damages upon proof of overcharge. But Section 205 of the Housing and Rent Act makes it mandatory to grant treble damages where the defendant does not sustain his defenses. It provides that the measure of damages is:

> "(1) $50, or (2) three times the amount of the overcharges by which the payment * * * received exceeds the maximum rent which could lawfully be demanded * * *, *whichever in either case may be the greater amount:"* [Emphasis added.]

unless the defendant pleads and proves lack of wilfulness *and* the taking of practicable precautions, in which event the amount of damages is the amount of the overcharges. This is made clear by *Small* v. *Schultz,* 173 F. 2d 940 (C. A. 7th), where the Court, speaking through Judge Major said (at pp. 943-944):

> "Thus, in any event the tenant is entitled to recover as liquidated damage the amount of $50, but if the trebled amount of the excess payment is greater than the amount of $50, he is entitled to recover such trebled amount and, in our view, the court has no discretion in that respect in the absence of a defense within the proviso contained in the section. If there be any doubt that the court is without discretion in the absence of such a defense, it is removed by the proviso itself, which states 'That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation' (sometimes referred to as the good faith defense). *In other words, in the absence of such defense, the court is required to enter a judgment for treble the amount of the excess payment, and when the court finds that such defense has been made, it is limited to the amount of the overcharge. In either event, no discretion is lodged in the court.*

In this connection, it is pertinent to note that a similar section (Section 205) of the Emergency Price Control Act of 1942 as amended, 50 U. S.

> C. A. Appendix, § 925, allowed recovery for an amount 'not more than three times the amount of the overcharge * * * as the court in its discretion may determine.' Under that provision this court has held that the allowance of treble damages was discretionary. *Bowles* v. *Krodel,* 7 Cir., 149 F. 2d 398, 401; *Fleming* v. *Gordon,* 7 Cir., 161 F. 2d 627, 628. In Section 205 of the instant Act, however, the words 'not more than' and 'as the court in its discretion may determine' have been omitted. In the instant case, this so-called good faith defense was neither alleged nor proven and the court so found. As a result, we think it was mandatory upon the court to award treble damages for the amount of the overcharge." (Emphasis added)

This principle was also recently upheld in the case of *United States of America* v. *The Earl Holding Co., et al.,* No. 3200 (D. C. Minn.), dated February 20, 1950, opinion unreported. In that case, the Court (Judge Nordbye sitting) granted treble damages after the establishment of the overcharges on the ground that "the Court has no alternative but to grant the treble damages sought,"[10] where the defendant failed to prove lack of wilfulness and the taking of practicable precautions.

The defendants here had neglected to prove either mitigating circumstance, and this Court should, therefore, remand the case to the Court below with instructions to enter a judgment for damages.

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[10] The opinion in this case is set forth in full in the Appendix (*Infra,* p. 21).

CONCLUSION

It is respectfully submitted that the judgment of the Court below be affirmed and the case be remanded to that Court with directions to enter a judgment for either the amount of the overcharges, or for treble that amount.

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APPENDIX

Rent Procedural Regulation 1 (13 F. R. 2369):

General Provisions

§ 840.14 *Right to Appeal.* (a) Any landlord subject to any provision of a maximum rent regulation, or of an order issued by a Regional Housing Expediter under § 840.12 (except an order remanding to the Area Rent Director), or of an order entered by an Area Rent Director under section 5 (d) of any maximum rent regulation, or of an order entered by an Area Rent Director under §§ 840.7 or 840.8 (c), may file an appeal in the manner set forth below.

(b) A landlord is subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him.

(c) Any appeal filed by a landlord not subject to the provision appealed from, or otherwise not in accordance with the requirements of this part, may be dismissed by the Housing Expediter.

United States District Court, District of Minnesota,

Fourth Division

No. 3200 Civil

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE EARL HOLDING COMPANY AND EARL SIMON, *Defendants*

MEMORANDUM DECISION

The above-entitled action came before the Court upon a motion by plaintiff for a temporary injunction to prevent alleged violation of the Rent Control Act of 1947, as amended. 50 U. S. C. A. Appt. Sec. 1881, et seq.

The parties have stipulated to the material facts. In July 1947, a house in Minneapolis was rented under a lease running from September 1, 1947, to September 1, 1948, for a rental price of $100 per month. Under the lease, the tenant was granted an option to renew the lease for two one-year periods. The tenant exercised the option right, and the lease has been extended to, and is in force until, September 1, 1950. Defendants now own that house and possess the rights and obligations of a landlord under the lease.

The Housing and Rent Act of 1947 was in effect when the lease was executed, and that Act provided that property not rented between February 1, 1945, and January 31, 1947, was exempt from the rent controls imposed under the Act. Consequently, defendants' house was not subject to rent control when the

lease was first executed. For it was rented for the first time in July 1947, effective September 1, 1947.

On March 31, 1949, the Housing and Rent Act of 1947 was amended, and the grounds of exemption for defendants' house from rent control was omitted. Consequently, the house became subject to rent control under the amended Act, and defendants registered their property with the appropriate office. They showed that the rental under the lease was $100 per month.

On October 27, 1949, the Housing Expediter, pursuant to authority granted to him by the Act, ordered that the rent be lowered from $100 to $70 per month, effective November 1, 1949. Defendants refused to accept $70 from the tenant as rent and informed the tenant that he would be evicted unless he continued to pay the $100 as required by the lease. The $100 rental has been paid every month.

Plaintiff now seeks an injunction to enjoin defendants from continuing to collect the $100 per month rather than $70, from evicting the tenant in question, and from otherwise violating the Housing and Rent Act of 1949. The parties have agreed that the decision upon this temporary injunction proceeding also can determine the permanent injunction and treble damages questions.

Defendants contend that the lease figure must control because the Expediter's order, which was made after the lease was executed and in operation, seeks to change an existing, operative contract which was valid when made, and that the order therefore violates the guarantees afforded defendants by the due process

clause of the Federal Constitution. The specific legal issue therefore is, Can the terms of a contract in the form of a lease be changed by this legislation which was subsequently enacted?

The question has been answered by the United States Supreme Court by its unanimous decision in the rent control case of *Fleming* v. *Rhodes,* 331 U. S. 100. In that case the court held, at page 107,

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment."

That holding is applicable here. It is not distinguishable merely because valid eviction judgments which were obtained prior to the effective date of the Rent Control Act were objects against which the Rent Act's prohibitions were there enforced. Previously acquired rights were involved just as they are in the instant case. For judgments are a type of previously acquired rights. The Court specifically spoke of such right, and reasoned from a general conclusion concerning them to a specific conclusion that previously acquired judgments could be affected by the Act. At page 107 the court held, "The rights acquired by judgments

have no different standing" from "previously acquired rights."

And in *Cobleigh* v. *Woods,* 175 F. 2d 167, cert. den., 337 U. S. 924, the Court of Appeals for the First Circuit specifically applied the rule of the *Rhodes* case to the rent clause of a rental agreement executed between July 1, 1946, and July 25, 1946. During that period rent control did not exist. The previous statute had lapsed. But when the Rent Control Act of 1946 was enacted, it provided that if property had been subject to the previous Rent Control Act, the landlord could not base the rent he thereafter collected upon a rental agreement made between July 1, 1946, and July 25, 1946, even though the agreement was still in effect. The landlord in the *Cobleigh* case claimed that such a prohibition was invalid. The court held unanimously, at page 169,

> The constitutional power of Congress so to provide is none the less effective though it may involve prospective modification of existing agreements between landlords and tenants, valid when made. *Fleming* v. *Rhodes,* 1947, 331 U. S. 100, 107, 67 S. Ct. 1140, 91 L. Ed. 1368; *Taylor* v. *Brown,* Em. App. 1943, 137 F. 2d 654, 659, certiorari denied, 1943, 320 U. S. 787, 64 S. Ct. 194, 88 L. Ed. 473.

Taylor v. *Brown,* 137 F. 2d 654, at 659, involved the right under the 1942 Rent Act to "roll back" rents which were set under leases executed before a rent control statute was enacted. The Emergency Court

of Appeals unanimously held that the statute permitting such a "roll back" was valid. The instant case is in principle the same sort of problem. The facts are, by analogy, almost identical. The *Taylor* decision aptly illustrates that defendants' attempt to distinguish the instant case from the *Rhodes* and *Cobleigh* cases upon the theory that the property involved in those cases had once been subject to rent control whereas the house in the instant case never had been subject to control prior to the Rent Act which is now in question, cannot be sustained. And, in any event, the *Rhodes* and *Cobleigh* cases do not turn on the narrow distinction which defendants urge. They turn on the proposition that a right obtained prior to the enactment of a statute can be limited or curtailed by the statute. They are not distinguishable from this case.

Insofar as *Pollack* v. *Seidman,* 82 N. Y. Supp. 2d 516, upon which defendants rely, is in conflict with this case, it should not be followed. It conflicts with *Woods* v. *Schmid,* (5 C. A.) 164 F. 2d 981, *Porter* v. *Merhar,* (6 C. A.) 160 F. 2d 397, *Porter* v. *Shibe,* (10 C. A.) 158 F. 2d 68, *Woods* v. *Durr,* (3 C. A.) 176 F. 2d 273, *United States* v. *Perhownik, et al.,* decided Oct. 14, 1946, Southern District of New York, and *United States* v. *Hanley,* (N. D. Calif.) decided October 31, 1949. Sound authority and reason dictate that the terms of a contract in the form of a lease can be changed, as plaintiff contends, by legislation subsequently enacted pursuant to constitutional authority. As defendants must recognize, the war powers of Congress are the valid constitutional basis for enactment of the rent control legislation. *Woods* v. *Miller,* 333

U. S. 138; *Woods* v. *Durr,* 176 F. 2d 273. Defendants have violated the statute, and upon the facts of this case plaintiff is entitled to the injunction it seeks.

Section 205 of the Housing and Rent Act for 1949 provides that treble damages may be obtained from a landlord who charges more than the maximum rent set by the Expediter unless the overcharge was not willful nor the result of failure to take practicable precautions against the occurrence of such overcharge. The burden of proof is upon the landlord. The evidence here shows that defendants knew of the Expediter's order and knowingly charged rent in excess of the amount specified therein. They did not exhaust their administrative remedies to change the order. They demand the excess amount under threat of eviction. In light of this showing the Court has no alternative but to grant the treble damages sought.

In view of the parties' agreement that the permanent injunction question should be determined by this decision, plaintiff is also entitled to a permanent injunction as prayed.

Plaintiff may present findings of fact, conclusions of law, and order for judgment consistent herewith. An exception is reserved to defendants.

Dated this 20th day of February 1950.

By the Court:

GUNNAR H. NORDBYE,
Judge.

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